Court of Appeals No. 44205-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

HENRY URQUIJO,

Appellant.

On Appeal from the Grays Harbor County Superior Court
The Honorable Gordon Godfrey, Judge

REPLY BRIEF OF APPELLANT

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RULES, STATUTES AND OTHER

A. ISSUES IN REPLY

1. Did the trial court violate the right to a public trial by taking peremptory challenges in a private proceeding closed from public view?

2. In the alternative, is resentencing required so the trial court may determine how much of the sentence to allocate to incarceration and how much to community custody?

B. ARGUMENTS IN REPLY

1. THE PEREMPTORY CHALLENGES OCCURED PRIVATELY, AWAY FROM PUBLIC SCRUTINY, IN VIOLATION OF THE RIGHT TO A PUBLIC TRIAL.

The State argues that the silent, unrecorded exercise of peremptory challenges does not implicate or violate the right to a public trial. Brief of Respondent (BOR) at 2-6. The State is incorrect.

The State relies on State v. Lormor, 172 Wn.2d 85, 257 P.3d 624 (2011) to argue that what occurred here was not a closure. BOR at 4. The discussion of what constitutes a closure in Lormor must be read in context. Lormor involved the exclusion of a single three-year-old on a ventilator, the noises from which the court found would be a distraction. 172 Wn.2d at 88-89. The Court held this was permissible given that the trial court has broad powers to deal with disruptions to orderly proceedings. Id. at 93-94, 96. The circumstances here are obviously

distinguishable. Moreover, Lormor provides that public trial right extends to trial and "those proceedings that cannot be easily distinguished from the trial itself," including jury voir dire. Id. at 93. This language supports Urquijo's claim.

The State also constructs a slippery slope, suggesting that next appellants will ask for the Bone-Club[1] analysis to apply to conversations between the prosecutor and lead investigator. BOR at 6. Urquijo is asserting that all portions of voir dire must be open to the public. This is not revolutionary or even out of the ordinary. The public trial right applies to voir dire, which is important to the adversaries in a proceeding, as well as to the criminal justice system as a whole. In re Personal Restraint of Orange, 152 Wn.2d 795, 804, 100 P.3d 291 (2004) (citing Press-Enter. Co. v. Superior Court, 464 U.S. 501, 505, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984)). The exercise of peremptory challenges, governed by CrR 6.4, is part of "voir dire." State v. Wilson, 174 Wn. App. 328, 342-43, 298 P.3d 148 (2013); see also People v. Harris, 10 Cal.App.4th 672, 684, 12 Cal.Rptr.2d 758 (1992) (state and federal authority support conclusion that "peremptory challenge process is a part of the 'trial' to which a criminal defendant's constitutional right to a public trial

[1] State v. Bone–Club, 128 Wn. 2d 254, 258-59, 906 P.2d 325 (1995).

extends"); accord, Hollis v. State, 221 Miss. 677, 74 So.2d 747 (1954) (to comply with state constitutional mandate of a public trial, peremptory challenges must be exercised at the bar, in open court, not at a private conference).

And while, as the State correctly points out, in most cases peremptory challenges are not subject to a ruling by the trial court,[2] it is the very lack of court control that makes it crucial they be open to public scrutiny in all cases. See State v. Saintcalle, ___ Wn.2d ___, ___ P.3d ___, 2013 WL 3946038, *7, *30-32, *46-47 (Aug. 1, 2013) (notwithstanding majority of justices' affirmance of denial of Batson[3] challenge, lead opinion, concurrence and dissent underscoring harm resulting from improper race-based exercise of peremptory challenges and highlighting difficulty of obtaining appellate relief even where discriminatory exercise may have occurred). Saintcalle highlights the need for public scrutiny, which encourages parties to police themselves and enhance the fairness of the trial process.

Finally, the State argues the claim should be rejected on the grounds that the proceeding was not a sidebar, because Urquijo was

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[2] BOR at 5.

[3] Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

present. BOR 3 n. 1. But Urquijo has not argued the State violated his right to be present. Whether he was present is irrelevant to the current claim. For purposes of public trial analysis, the proceeding here was similar to a sidebar.

As argued in Urquijo's opening brief, the procedure was shielded from public scrutiny and was therefore closed to the public. Moreover, the multitude of cases prohibiting closed voir dire controls the result here. Reversal is therefore required. State v. Wise, 176 Wn.2d 1, 16-19, 288 P.3d 1113 (2012).

2. ALTERNATIVELY, RESENTENCING IS REQUIRED SO THE COURT MAY ALLOCATE THE INCARCERATION AND COMMUNITY CUSTODY PORTIONS OF THE SENTENCE.

The State concedes remand is appropriate but argues that the community custody term should simply be stricken. BOR at 8. However, the remedy is to either amend the community custody term *or* to resentence Urquijo consistent with RCW 9.94A.701(9). State v. Boyd, 174 Wn.2d 470, 473, 275 P.3d 321 (2012).

RCW 9.94A.701(9) provides that the community custody term specified by RCW 9.94A.701 "shall be reduced by the court whenever an offender's standard range term of confinement in combination with the term of community custody exceeds the statutory maximum for the

crime." Thus, if the court wishes that Urquijo serve some period of community custody, it may reduce the term of incarceration. Boyd, 174 Wn.2d at 473.

C. CONCLUSION

For the reasons set forth above and in the appellant's opening brief, Mr. Urquijo's convictions should be reversed. In the alternative, the case should be remanded for resentencing.

DATED this 13TH day of August, 2013.

Respectfully submitted,

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	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 13TH DAY OF AUGUST, 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] HENRY URQUIJO
DOC NO. 803790
CLALLAM BAY CORRECTIONS CENTER
1830 EAGLE CREST WAY
CLALLAM BAY, WA 99326

SIGNED IN SEATTLE WASHINGTON, THIS 13TH DAY OF AUGUST, 2013.

X Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

August 13, 2013 - 2:33 PM

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